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## THE RELATION OF THE EQUITY ADMINIS- TERED BY THE COMMON LAW JUDGES TO THE EQUITY ADMINISTERED BY THE CHANCELLOR<sup>1</sup>

For some time past evidence has been accumulating that, in the twelfth, thirteenth and the early years of the fourteenth centuries, the tribunals which developed into the common law courts and the courts of the itinerant judges administered both law and equity. It may perhaps be said that this statement involves an anachronism, because, by making use of the modern technical terms "law" and "equity," modern ideas and distinctions are read into mediaeval phenomena, to which these ideas and distinctions were unknown. Such a criticism would be partially, but not wholly true. In the course of the thirteenth century the courts of common law, and the law which they administered, had acquired so many of their permanently distinctive characteristics, that it is possible to differentiate the large number of cases in which these characteristics occur, from the comparatively small number of cases in which an appeal is made to

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<sup>1</sup> The chief authorities are Bigelow, *History of Procedure*, 192-6; Holmes, *Early English Equity*, 1 *LAW QUART. REV.* 162-174; *Eyre of Kent* (Selden Society), Vol. II., *Introd.* xxi-xxx; *Select Bills in Eyre* (S. S.); Hazeltine, *The Early History of English Equity, Essays in Legal History*, 1913, 261-285; Pollock, *The Transformation of Equity*, *ibid.*, 286-296; Powicke's *Review of the Select Bills in Eyre*, 30 *ENG. HIST. REV.* 330-336; G. B. Adams, *The Origin of English Equity*, 16 *COLUMBIA LAW REV.* 87.

equitable considerations and doctrines associated, in modern times, with the equitable jurisdiction of the chancellor. That cases in which these equitable considerations and equitable doctrines occur are more numerous than was at one time supposed is now a well ascertained fact. They raise the important question whether the equity which the common law judges administered in these cases can be regarded as the beginnings of the system of equity developed by the chancellor; or whether these early equitable doctrines so completely died out that we must regard the chancellor's equity as a new and a different development.

Distinguished authorities have maintained that some, at least, of the manifestations of these early equitable doctrines are so substantially similar to the equity of the chancellor, that they may be said to have had a continuous history. Mr. Bolland, speaking of the bills in Eyre, says, "I think there can be no doubt that these bills are the very beginning of the equitable jurisdiction."<sup>2</sup> Dr. Hazeltine says that the Chancery "did not originate English Equity, for it simply carried on the work of the older courts by developing in greater fulness and with a different machinery the equity inherent in royal justice."<sup>3</sup> It is the purpose of this paper to try and ascertain whether this early equity, administered by the common law judges, is so closely connected with the equity administered by the chancellor, that these two periods in the history of equity can in any sense be said to be continuous.

Any question of historical continuity is always very debatable. What amount of resemblance will justify us in asserting that there is no breach of continuity? What amount of difference will justify us in asserting that there is a breach of continuity? These are questions which different persons will answer in different ways. But clearly we cannot answer them by looking at any one feature of the institutions or doctrines which we are considering. We must look at them from all the most important points of view. And therefore in considering this question of the continuity of these two phases of English Equity I propose to look at them from four points of view:—The point of view of the tribunals by which they were administered; of the procedure which those tribunals employed; of the theories upon

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<sup>2</sup> *The Eyre of Kent* (S. S.), II., xxviii, xxix.

<sup>3</sup> *Essays in Legal History*, 285.

which the equitable rules were based; and of certain of the equitable doctrines to which they gave rise.

## TRIBUNALS

It is quite clear that the jurisdiction exercised by the undifferentiated Curia Regis of the twelfth century was marked by two of the chief characteristics which we associate with a court of equity. Proceedings were begun by a petition to the king for his interference;<sup>4</sup> and that interference might result in remedies which, by reason both of their character and their methods of enforcement, were, as Professor Adams has said, "as much outside of, and in violation of, the ordinary system of justice which prevailed throughout the Anglo-Norman state, as ever Equity was at any later time in relation to the Common Law system."<sup>5</sup> But, in the course of the thirteenth and fourteenth centuries, these remedies, the rules to which they gave rise, and the machinery by which they were enforced, rapidly developed and hardened into a regular system of law. As that system reduced the remedies and rules and machinery of the older courts to insignificance, the rules of the Curia Regis became the ordinary common law of the country, and ceased to possess that characteristic of being something outside the ordinary law, which had once given to them an equitable character. At the same time the other equitable characteristic which it had once possessed—the immediate dependence of its remedies upon the royal power—weakened. In the first place it acquired a number of writs *de cursu* which any litigant could purchase. In the second place the barons, and later the Parliament, perceiving that the power to make new writs was in substance a power to make new law, limited the king's discretion to invent new remedies.<sup>6</sup> Thus the system of the common law tended to become rigid and technical; and this tendency was strengthened when, at the close of the thirteenth century, its development began to be controlled almost entirely by men who had been trained as practitioners in the royal courts.<sup>7</sup> But, naturally, the equitable characteristics which had marked the jurisdiction of the Curia Regis did not at once vanish from those separate courts which had sprung from it.

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<sup>4</sup> G. B. Adams, 16 COLUMBIA LAW REV. 89-90.

<sup>5</sup> *Ibid.*, 93.

<sup>6</sup> Holdsworth, *Hist. Eng. Law*, II., 247-8

<sup>7</sup> *Ibid.*, 182, 267.

We can see traces of them, certainly as late as the first quarter of the fourteenth century, both in the three common law courts, and in the courts held by the itinerant justices.

In the days of Bracton the court of King's Bench and the King's Council were to a large extent staffed by the same men.<sup>8</sup> The two institutions which became in later days the court of King's Bench and the Council were not as yet distinct; and, even when they became distinct, the connection between the two was close. Cases occur as late as Edward III's reign in which the proceedings seem to be heard by a tribunal which is both court and council.<sup>9</sup> Naturally this tended to preserve the tradition that the court of King's Bench ought to administer both law and equity; and the fact that the tradition was thus preserved in the court of King's Bench helped to preserve it also in the court of Common Pleas. The King's Bench was the court in which the errors of the Common Pleas were corrected; both courts were staffed by men who had had a similar training; and judges were sometimes moved from one bench to the other.<sup>10</sup> In fact, as I have elsewhere pointed out<sup>11</sup> and as I shall show later in this paper,<sup>12</sup> both the court of Common Pleas and the court of King's Bench did apply to cases which came before them ideas and doctrines which we have come to associate with equity rather than with law. But early in the fourteenth century these cases were becoming rare. As Professor Baldwin has pointed out, quite early in the thirteenth century the King's Bench was tending to hear cases in accordance with "the formulaic procedure" of the common law.<sup>13</sup> That tendency was more pronounced in the case of the court of Common Pleas. The King's Bench continued in some cases to employ "the free and unrestricted procedure of the old Curia Regis."<sup>14</sup> But, by the middle of the fourteenth century, in both courts, the common law procedure was generally followed;<sup>15</sup> and, as that pro-

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<sup>8</sup> Baldwin, *The King's Council*, 61-2.

<sup>9</sup> Baldwin, *The King's Council*, 64; cp. Holdsworth, *Hist. Eng. Law*, I., 82-3.

<sup>10</sup> See Foss's Tables of the judges of the courts of King's Bench and Common Pleas, *Lives of the Judges*, III., 25-26, 201-2, 353-5.

<sup>11</sup> Holdsworth, *Hist. Eng. Law*, II., 249, 250.

<sup>12</sup> Below.

<sup>13</sup> *The King's Council*, 62.

<sup>14</sup> *Ibid.*, 62.

<sup>15</sup> *Ibid.*, 64.

cedure had now hardened into a very technical system, this is a sure sign that the capacity of these courts to administer equity had disappeared.

The Court of Exchequer was a court of a character different from that of the King's Bench and Common Pleas.<sup>16</sup> Its connection with the Council was intimate; and, in the thirteenth and early part of the fourteenth century, cases which demanded the application of equitable principles frequently came before it.<sup>17</sup> But, as Professor Baldwin has shown, in Edward II's reign the chancellor got the better of the treasurer, and the Chancery and Council took the jurisdiction over these cases away from the Exchequer.<sup>18</sup> It was not till later that the Exchequer began to develop both the common law and the equitable jurisdiction which it subsequently obtained.<sup>19</sup> Throughout the mediaeval period it concerned itself mainly with its proper function—the consideration of cases connected with the king's revenue.

That the justices in Eyre administered a large equitable jurisdiction in proceedings begun by bill has been recently discovered by Mr. Bolland. Of these bills I shall speak at large in my next section. Here it will be sufficient to say that they are, so far as we know, peculiar to the General Eyre.<sup>20</sup> The reason for this is perhaps to be found partly in the fact that the justices in Eyre represented the person, and were commissioned to exercise the powers, of the king in an eminent degree;<sup>21</sup> partly in

<sup>16</sup> Holdsworth, *Hist. Eng. Law*, I., 100-104.

<sup>17</sup> Baldwin, *The King's Council*, 219-228.

<sup>18</sup> *Ibid.*, 228-231.

<sup>19</sup> *Ibid.*, 232; on the common law side this is illustrated by the numbers of cases on the rolls of the court of Exchequer as compared with the number of cases on the rolls of the two Benches, see 18 LAW QUART. REV. 134.

<sup>20</sup> *The Eyre of Kent* (S. S.), II., xxiii—Mr. Bolland says, "The vagueness of the address and the frequent absence of any date make it impossible to say with any certainty that all these bills were presented in Eyre, though when we get any trustworthy indication of time in connection with venue it usually seems to point to such a presentation."

<sup>21</sup> Mr. Boland in the *Eyre of Kent* (S. S.), III., xlvi, accepted the *dictum* of Shareshull, C. J., in 27 Ass. pl. 1, that the King's Bench is Eyre and higher than the Eyre; but in *Select Bills in Eyre* (S. S.), xv-xix, he contends that this view is erroneous; Professor Powicke, 30 ENG. HIST. REV., 334-5, has given good reasons for preferring Mr. Bolland's former view; but, having regard to the wide jurisdiction of the Eyre, it would probably be true to say that it was a court almost as high as

the fact that their court gave to dwellers in the country a unique opportunity to appeal to those powers of administering equity which the king still possessed.<sup>22</sup> This would explain why bills, like the bills in Eyre, were not presented to the King's Bench or Common Pleas. Litigants who approached the courts at Westminster with cases of this kind would be more likely to petition the Council. However that may be, they are a striking and a late example of the equity which the Curia Regis and the King's Bench in its early days were accustomed to administer. But in the course of the fourteenth century the General Eyre ceased.<sup>23</sup> Its place was taken by itinerant judges who acted under limited commissions, and tried cases according to the strict procedure of the common law.<sup>24</sup>

Thus all these common law tribunals ceased to administer equity. Cases which called for equity went to the Council, and later to the Chancery.<sup>25</sup> Thus the administration of equity was handed over to a tribunal which, in time, came to be perfectly distinct from any of the common law courts. And this is perhaps the most unique feature of English as contrasted with Roman equity. The Roman *praetor urbanus* administered both law and equity; and therefore it was easier to fuse the two systems: the chancellor and the common law judges were distinct and often rival authorities. Thus Justinian could effect what the English Judicature Acts could not effect. He fused law and equity: they, for the most part, only fused the courts which administered law and equity.

It would seem therefore that there is no continuity in the equitable jurisdiction of the common law courts. They ceased

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the King's Bench; this would seem to be borne out by the extract from Britton, I., 19-20, cited by Mr. Bolland, *Select Bills in Eyre* (S. S.), xviii—"And meantime we will command our Justices of the Bench that they adjourn all the pleas of the county and send them *before us or such Justices itinerant in that county*, so that they be there at the day named."

<sup>22</sup> Mr. Bolland says, *Eyre of Kent* (S. S.), II., xxiii, "All these bills appear to be country bills, and I feel no doubt that if any of them were not presented in Eyre—in a General Eyre, to be quite accurate—they were at any rate presented in those less comprehensive Eyres of Justices erranz' commissioned to hold common pleas, to whom the King gave also authority 'to hear . . . any complaints whatsoever and to make fitting amends therefore.'"

<sup>23</sup> Holdsworth, *Hist. Eng. Law*, I., 115-6.

<sup>24</sup> *Ibid.*, I., 116-123.

<sup>25</sup> *Ibid.*, I., 199.

to administer it; and litigants, if they wanted equity, were driven to a tribunal the procedure of which had remained free from the technical rules which governed procedure of the common law courts.<sup>26</sup> The question now arises whether the equity there administered was so substantially similar to the equity formerly administered in the common law courts that we can regard it as a continuation, or whether it was so essentially different that we must regard it as a new departure. This question I shall endeavor to answer in the following sections.

#### PROCEDURE

In modern law a salient difference between the procedure in an action at law and the procedure in a suit in equity consisted in the fact that, in an action at law, the proceedings were begun by writ, and were based upon a legal right which the plaintiff asserted had been infringed; while, in a suit in equity, the proceedings were begun by bill, and were based upon facts which made it just and equitable that the plaintiff should get the remedy or relief which he sought. Therefore, when it was discovered that, at the General Eyre, there was a procedure according to which aggrieved persons could begin legal proceedings by bill; that in these bills suitors applied to the court for relief on general grounds of justice and equity; and that they used language which was in many cases identical with that used in the early bills in Chancery,—it was not unnaturally thought that the origin of the Chancery procedure must be looked for in these bills in Eyre. In considering the question whether this view is correct I shall in the first place describe the general characteristics of these bills. Secondly, I shall say something of the term “bill” and the various sorts of “bill” known to English law; and I shall endeavour to ascertain which of these categories of bills, the bills in Eyre most resemble. Thirdly, I shall point out some salient differences between the procedure upon these bills in Eyre and the procedure upon the bill in Chancery.

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<sup>26</sup> “In distinction from the bench of the *curia regis* which became the king’s bench, the council was not swept into the current of the common law. True to the traditions of the older court *coram rege* and the original *curia*, it remained a body of indefinite powers and unrestricted procedure,” Baldwin, *The King’s Council*, 64.



(i) *The Characteristics of the Bills in Eyre*

These bills are found chiefly in the Eyre of Shropshire of 1292, the Eyre of Staffordshire of 1293, the Eyre of Kent of 1313-14, and the Eyre of Derbyshire of 1331.<sup>27</sup> They present a striking similarity both in form and in substance to some of the early bills addressed to the chancellor, or to the chancellor and Council. The suppliants are not tied down to the strict rules of form which governed the wording of the writ.<sup>28</sup> They are phrased in simple and often in illiterate language.<sup>29</sup> Some, perhaps, were written by a professional letter writer.<sup>30</sup> Others, when written more than ordinarily badly, were copied literally by some clerk.<sup>31</sup> They were largely but not exclusively used by poor people;<sup>32</sup> and, like the later bills addressed to the chancellor, they pray a remedy "for God's sake," "for charity's sake," "for the love of Jesus Christ," "for the Queen's soul's sake."<sup>33</sup> They are generally addressed "A les Justices nostre Seygnur le Roy",<sup>34</sup> and they ask for a remedy—generally damages, sometimes an injunction or other order—on equitable grounds.<sup>35</sup> And the wrongs for which these remedies are sought are of the most varied character. Mr. Bolland says:<sup>36</sup> "We see that no misfeasance or non-feasance was too slight or too grave to be the subject of a complaint by a bill in Eyre. The recovery of debts, large and small, and the enforcement of contracts were sought for by them. Damages were claimed by them for detainue, breach of contract, trespass, negligence, illegal distress, wrongful imprisonment, for abduction of ward, for conspiracy to deceive the court and pervert the course of justice, and for almost every other tortious act or omission by which a man might be endamaged. . . . They tell of crimes of violence for which up to comparatively recent times a man . . . would certainly have been hanged." Some of the stories they relate are wonderful. One, which tells of a gallant who broke into

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<sup>27</sup> *Select Bills in Eyre* (S. S.), xxxiv.

<sup>28</sup> *Eyre of Kent* (S. S.), II., xxvi.

<sup>29</sup> *Select Bills in Eyre* (S. S.), xix.

<sup>30</sup> *Ibid.*, xix.

<sup>31</sup> *Ibid.*, xix, xx.

<sup>32</sup> *Eyre of Kent* (S. S.), II., xxv, xxvi.

<sup>33</sup> *Ibid.*, xxv.

<sup>34</sup> *Ibid.*, xxii.

<sup>35</sup> *Select Bills in Eyre* (S. S.), xl; see e. g. cases 10, 33, 64.

<sup>36</sup> *Ibid.*, xl.

a house through a cellar wall, and eloped with the faithless wife and part of the husband's property,<sup>37</sup> reads, as Mr. Bolland says, "like the synopsis of a story in some such collection as *Les Cent Nouvelles Nouvelles*."<sup>38</sup>

It is hardly surprising that, in the first excitement of discovery, these bills should be regarded as the direct ancestors of the early bills sent up to the chancellor. But, before the validity of this pedigree can be admitted, we must look at these bills, and the proceedings taken thereon, a little more closely.

(ii) *The Term "Bill" and the Various Sorts of "Bill" Known to English Law*

Mr. Bolland is probably right in his suggestion that the word "bill" is derived, not as it is said in the Oxford English Dictionary from *bulla*, but from *libellus*, through the French *libelle*. The word *libelle*, like the old English word "book," meant in its original sense a charter or sheet of parchment with writing on it. It then acquired, from its use in the law of procedure, the technical sense of a complaint or statement of claim. Probably "bill" is a clipped form of *libelle*, and was used to signify a complaint.<sup>39</sup> But it never acquired in English law quite the precise technical meaning that it acquired in Roman law. It seems rather to have been used as a generic term for many forms of complaint or petition which were not begun by original writ. Thus it was, and still is, the name for a written information as to the commission of a crime which, when found to be true by the grand jury, will become an indictment.<sup>40</sup> It was used to signify a complaint against the king, which could not be prose-

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<sup>37</sup> *Select Bills in Eyre* (S. S.), case 49.

<sup>38</sup> *Ibid.*, xxiii.

<sup>39</sup> *Select Bills in Eyre* (S. S.), xi-xv; Powicke, 30 ENG. HIST. REV. 334.

<sup>40</sup> Stephen, *History of Criminal Law*, I, 274; and this procedure was as old as the reign of Edward I; Solomon of Rochester, one of the judges accused before Edward I's commissioners "dicit quod in itinere justiciariorum talis est consuetudo pro pace observanda, quod quicumque de populo huiusmodi billam obtulerit cuicumque justiciario majori vel minori, idem justiciarius illam billam debet recipere et tradere eam duodenis juratoribus ad capitula corone, ita quod, si verum sit quot in ea continetur, ipsi presentant illud in veredicto suo, et si non sit verum quod deniant billam istam," *State Trials of the Reign of Edward I* (Camden Society) 3d series, 69, cited *Eyre of Kent* (S. S.), II., xxii, n. 2.

cuted by writ because no writ lay against the king.<sup>41</sup> The complaints against Edward I's judges were made by bills.<sup>42</sup> Actions by and against officials of the three common law courts, and the court of Chancery were begun by bill in the court to which they were attached;<sup>43</sup> there was an old procedure by bill, long disused in Hale's time, for contempts, deceits, trespasses, and other matters which might originally have been begun by writ in the King's Bench;<sup>44</sup> and there was the well known procedure by bill of Middlesex against a person *in custodia Marescalli*.<sup>45</sup> Then we have the bills sent up by the House of Commons to the king, which, by an important change in Parliamentary procedure in the fifteenth century, became the "Billae formam actus in se continentes," and the "Bills entituled Acts," of our modern law.<sup>46</sup> Finally we have the bills sent up to the Council and chancellor, or to the chancellor, which came to be the method of initiating proceedings in the court of Chancery.

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<sup>41</sup> "In old times every writ, whether of right or of the possession, lay well against the king, and nothing is now changed except that one must now sue against him by bill where formerly one sued by writ," Year Books, 33-35 Edward I (Rolls Series), 471, *per Passeley arg.*

<sup>42</sup> *The Eyre of Kent* (S. C.), II., xxi.

<sup>43</sup> Hale, A Discourse concerning the courts of King's Bench and Common Pleas, *Harg. Law Tracts*, 364-5.

<sup>44</sup> "These suits were for the most part for contempts, deceits, and trespasses upon the case, whether the same were committed in the same county where the court sat, or in other counties. And the course was, (1) For the party to enter his plaint or bill, (2) thereupon he had the like process as was natural in such suit, had it been thereby original;" Hale then gives some instances of these bills for trespass and other matters from Edward III's reign, and remarks that, in those days, if the party did not proceed by original writ he proceeded by original bill, and not by bill of Middlesex—"which seems not to be so ancient a practice"; Hale then notes the following points in connection with these bills.—(1) The bill was filed before process was made. (2) The process was pursuant to the course of law. (3) The process was special according to the nature of the bill as if the suit had been by original writ. (4) "This bill lay not for any such cause, wherein the original writ lay not in the king's bench; and therefore was not in debt, detinue, account, or covenant." (5) They were not frequent. (6) They have been long disused, partly because they diminished the king's revenues derived from writs, partly because the procedure by way of bill of Middlesex was more expeditious, *Harg. Law Tracts*, 363, 364.

<sup>45</sup> *Ibid.*, 365-6; Holdsworth, *Hist. Eng. Law*, I., 87-89.

<sup>46</sup> Redlich, *Procedure of the House of Commons*, I., 16, 17; Anson, *The Parliament*, 249-251; Holdsworth, *Hist. Eng. Law*, II., 363-366.

The question now arises, To which of these categories of bills do the bills in Eyre bear the most resemblance? Professor Powicke has suggested that these bills were necessitated by the breakdown of the criminal appeal.<sup>47</sup> The cases collected by Mr. Bolland prove, as he says, "the necessity of methods of accusation open to individuals."<sup>48</sup> I have elsewhere pointed out that, if justice is to be done, the law must provide some procedure which will enable the injured person to come forward and obtain a remedy for himself; and that, in consequence, the presentment by the country side and the subsequent indictment at the king's suit need to be supplemented by the action of the injured person.<sup>49</sup> I have suggested also that the breakdown of the criminal appeal left a large gap which was ultimately filled by the writ of trespass and its offshoots.<sup>50</sup> Now, at the period when these bills appear, the writ of trespass was as yet new, and the development of its offshoots had hardly begun. It may be that these bills helped to fill the gap left by the decay of the appeal, and not yet filled by the writ of trespass. And, in this connection, we may naturally think of that procedure by bill in the King's Bench mentioned by Hale, which had been long disused in his day.<sup>51</sup> These bills, he tells us, were brought "for the most part for contempts, deceits, and trespasses upon the case."<sup>52</sup> If this procedure was a survival from a procedure by bill which in any way resembled the bills in Eyre, it would naturally tend

<sup>47</sup> 30 ENG. HIST. REV. 333; for the criminal appeal and its decay see Holdsworth, *Hist. Eng. Law*, II., 201, 305-307.

<sup>48</sup> "If the cases edited by Mr. Bolland prove anything, they prove the necessity of methods of accusation open to individuals. They show that the grave charges brought against the juries of presentment in the Statute of Winchester were more than justified; to read them one would think that the tithing, the hue and cry, and the sworn knights of the hundred, had never existed. A simple form of the appeal was essential during the interval between the breakdown of the system of corporate responsibility and the reorganisation of criminal jurisdiction through the justices of the peace," Powicke, 30 ENG. HIST. REV. 333.

<sup>49</sup> Holdsworth, *Hist. Eng. Law*, II., 305.

<sup>50</sup> *Ibid.*, II., 305, 377.

<sup>51</sup> Above, note 44.

<sup>52</sup> *Ibid.*, it will be noticed that Hale says that these bills could not be brought on any cause "Wherein an original writ lay not in the king's bench, and therefore not in debt, detainue, account or covenant"; on the other hand these bills in Eyre did lie in these cases; but this is not surprising as the jurisdiction of the Eyre covered both these causes of action and causes of action which belonged to the King's Bench.

to fall into disuse when writs of trespass became common, and numerous writs of trespass on case began to develop. Moreover the procedure by bill of Middlesex was, as Hale notes, found to be more expeditious.<sup>53</sup>

At any rate we shall now see that the procedure on these bills in Eyre, in one most important respect resembled these bills in the King's Bench, and differed from the bills by which a suit in equity was begun before the chancellor.

(iii) *The Procedure on the Bills in Eyre and the Procedure on Bills in Chancery*

A plaintiff who sued by bill was not liable to fail for defects in the form of the bill, provided the bill told an intelligible and consistent story.<sup>54</sup> In fact the judge would occasionally question a plaintiff in order to bring out the essential cause of complaint.<sup>55</sup> But it would seem that, when the bill was before the court, "the subsequent proceedings under it were exactly the same as though action had been taken by writ."<sup>56</sup> The endorsements on the bill seem to show, Mr. Bolland says, that the process was the same;<sup>57</sup> and what indications we have, seem to point to the conclusion that the course of pleading upon them in court was also the same.<sup>58</sup> Here again we may remember that Hale tells us that, under the bill procedure in the King's Bench, the bill must be filed before process is made, and that the subsequent course of the process was the same as if the action had been begun by writ.<sup>59</sup> Now all this is entirely different from the subsequent procedure upon a bill brought before the chancellor.

In the fifteenth century the course which the procedure upon a bill brought before the chancellor took was somewhat as follows:—The bill usually prayed that a subpoena<sup>60</sup> should be issued to secure the appearance and examination of the defend-

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<sup>53</sup> *Ibid.*

<sup>54</sup> *The Eyre of Kent* (S. S.), II., xxvi, xxvii.

<sup>55</sup> *Ibid.*, II., xxvi.

<sup>56</sup> *Bills in Eyre* (S. S.), xxii.

<sup>57</sup> *Ibid.*

<sup>58</sup> See, e. g., *Bills in Eyre* (S. S.), App. A., pp. 152-155, where further proceedings on several bills are given from Hale, MSS. 137, (2) and 44.

<sup>59</sup> Above, note 44.

<sup>60</sup> Sometimes the prayer was for a writ of certiorari or habeas corpus.

ant. At the foot of the bill were the names of the pledges to prosecute. In this they resemble some of the bills in Eyre;<sup>61</sup> but it should be observed that, in the case of the bills in Chancery, these pledges were rendered necessary by the fact that a statute of Henry VI's reign had prohibited the issue of a writ of subpoena till the plaintiff had found sureties to satisfy the defendant's damages if he did not prove his case.<sup>62</sup> When the defendant appeared, both the plaintiff and his witnesses, and the defendant and any witnesses which he might produce, were examined by the chancellor or by some other person deputed by him.<sup>63</sup> The methods which the chancellor used to elicit the truth by the examination and the re-examination of witnesses, and by compelling the production of documents were very effective. Professor Barbour has explained this very clearly. He says:<sup>64</sup> "The examination was under oath; it is sometimes said to be on the sacrament, sometimes 'on a boke.' If the defendants lived at some distance from London, or were ill and unable to appear, a commission by writ of *Dedimus Potestatem* would be granted to take the defendant's answer and also to examine witnesses. A certificate of the answer and testimony would then be taken into chancery. . . . Evidence verbal or written was placed on the same footing, but the Chancellor compelled a petitioner to prove his case. If he deemed the evidence insufficient or conflicting, he would call for more, and no decree could be had until it was produced."

No doubt in many cases the facts elicited were decisive; and this, as Spence suggests,<sup>65</sup> may account for there being so many bills without and further proceedings thereon. But often there were further proceedings. The defendant might answer the bill,<sup>66</sup> or demur to it,<sup>67</sup> or plead specially, *e. g.*, that the proper

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<sup>61</sup> *Bills in Eyre* (S. S.), *passim*.

<sup>62</sup> 15 Henry VI, c. 4; Barbour, *The History of Contract in Early English Equity*, *Oxford Studies in Social and Legal History*, IV., 145; these pledges to prosecute soon became as fictitious in Chancery as they were in the common law courts; Martin, *Archaeologia* (2d series), Vol. X., pt. ii, 353-5; at p. 355 he mentions a case in which the second pledge's name is simply the first pledge's name spelt backwards.

<sup>63</sup> Barbour, *op. cit.*, 149.

<sup>64</sup> Barbour, *op. cit.*, 149.

<sup>65</sup> Spence, *Equitable Jurisdiction*, I., 372.

<sup>66</sup> *Ibid.*, I., 373

<sup>67</sup> *Ibid.*

parties had not been joined.<sup>68</sup> Naturally the common lawyers tried to introduce their technical rules of pleading.<sup>69</sup> We get replications and rejoinders not unlike those used in the common law courts. But the chancellors set their faces against attempts to defeat plaintiffs by objections based upon the technical common law rules of pleadings;<sup>70</sup> and they always maintained that in their court litigants were not to be prejudiced by mispleading or defects of form, and that they were to be judged according to the truth of their cases.<sup>71</sup>

Now it is quite clear that we have here a procedure very different from the procedure on the bills in Eyre. The only resemblance is in fact that the proceedings are begun by a bill. The most salient feature of the chancery procedure—the examination of the parties and their witnesses—is absent. I conclude, therefore, that the differences between the procedure on the bills in Eyre and the procedure on the bills in Chancery are so marked that it can hardly be supposed that the one was derived from the other. Professor Adams is quite correct when he says that “the ancestor of the bill in Equity is to be found, not in the bills in Eyre, but in the petitions to the Council.”<sup>72</sup>

As we shall now see, the fact that the most salient feature of the chancery procedure was the examination of the parties and their witnesses, points to a very fundamental difference between the theories upon which the equity of the common law courts and the equity of the chancellors were based.

#### THEORIES UPON WHICH EQUITABLE INTERFERENCE WAS BASED

The equity administered through the common law courts was administered on the broad basis that justice must so far as possible be done to parties who had a good ground of complaint. The equity administered by the chancellor, on the other hand, rested on the more restricted idea of the canon lawyers,

<sup>68</sup> Y. B. 8 Ed. IV, Trin. pl. 1, cited *ibid.*, n. h.

<sup>69</sup> Spence, *op. cit.*, 375.

<sup>70</sup> Y. B. 9 Ed. IV, Trin. pl. 9; cp. Y. B. 9 Ed. IV, Mich. pl. 26.

<sup>71</sup> Y. B. 9 Ed. IV, Trin. pl. 9.

<sup>72</sup> 16 COLUMBIA LAW REV. 98; and Professor Powicke is inclined to agree; he says, “Sir Frederick Pollock has noticed the similarity between the bill in eyre and the bill in chancery; yet I venture to think that it would be erroneous, on the strength of this similarity, to suggest that the bill in chancery developed from the bill in eyre,” 30 ENG. HIST. REV. 332.

that the court ought to compel each individual litigant to fulfill the duties dictated by reason and conscience.<sup>78</sup> It followed that the examination of the litigant was absolutely essential to the administration of equity. Obviously, the judge could not ascertain what course of action conscience would dictate in any given case unless by this examination he elicited all the facts. Thus the theory on which the chancellor's equitable interference was based differed from the theory upon which the equity administered by the common law was based. Further we must remember that the whole system of the equity of the chancellor was, to a large extent, governed by the existence of the rival system of the common law. That system the chancellors followed critically—supplementing it and correcting it. This introduces another element into the equity of the chancellor which was necessarily wholly absent from the equity administered by the common law courts. We shall now see that these differences were the cause of considerable differences between the equitable doctrines which were evolved in these two jurisdictions.

#### EQUITABLE DOCTRINES

The two equitable doctrines which I have selected for purposes of illustration are the rules as to the grant of Specific Relief and as to Uses.

##### *Specific Relief*

In the time of Bracton the common law courts gave specific relief in a large number of cases. Generally this relief was incidental to and based upon the specific relief which was the characteristic feature of the real actions. These actions covered a very wide field. They could be used, not only to enforce a plaintiff's right to the possession of a freehold interest in land, but also to enforce the obligations of the lords and tenants

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<sup>78</sup> Vinogradoff, Reason and Conscience in Sixteenth Century Jurisprudence, 24 LAW QUART. REV. 379, says: "In the thirteenth and fourteenth centuries, in the period of the early predominance of the common law, equity, though specifically recognised, and sometimes applied in practice, was taken in a wider sense, including justices and analogy;" on the other hand, it is clear from St. Germain's *Doctor and Student* that the ecclesiastical chancellors were governed by a different principle—"St. Germain formulates distinctly the proposition that equity excepts from the law on grounds supplied by reason and conscience, and it is on the strength of conscience that remedies in equity were commonly granted."



of land.<sup>74</sup> We accordingly find that specific relief could be got (a) in actions to enforce obligations connected with property and contracts; and (b) to prevent various kinds of wrongs to property.

(a) If a landlord broke his covenant to lease land for a term of years, the court restored possession to the lessee;<sup>75</sup> and similar relief could be got by the writ *Quare ejecit infra terminum*.<sup>76</sup> Many various arrangements relating to land could be made by fine; and specific relief could be got if the parties did not keep their bargains. In one case the sheriff was not only ordered to deliver seisin in accordance with the terms of a fine, but also to demolish a ditch which had been erected in a place where there was a right of common.<sup>77</sup> In another case the party in default was ordered to fulfill his duty of warranty,<sup>78</sup> and in another he was forbidden to demand forinsec service.<sup>79</sup> The duty of a donor to warrant the title of his donee,<sup>80</sup> of a lord to perform the services due to his superior lord so that his tenant was not distrained by that superior lord,<sup>81</sup> of a lord to take the homage of a tenant,<sup>82</sup> of a tenant to repair,<sup>83</sup> are all specifically enforced. These duties were enforced sometimes by distraint,<sup>84</sup> sometimes by taking security,<sup>85</sup> and sometimes by forfeiture of the land.<sup>86</sup>

<sup>74</sup> Holdsworth, *Hist. Eng. Law*, III., 1-19.

<sup>75</sup> *Ibid.*, III., 180; cf. *Bracton's Note Book*, case 1739.

<sup>76</sup> Holdsworth, *Hist. Eng. Law*, III., 181.

<sup>77</sup> *Bracton's Note Book*, case 1579, "Et ideo consideratum est . . . quia cognoscit finem, habeat Abbas breve ad vicecomitem quod secundum proportionem cyrographi habere faciat eidem Abbati communam illam, et si fossatum levaverit infra communam illam, illud prosterni faciat ita quod pastura illa sit in eodem statu quo fuit quando concordia facta fuit inter eos"; cf. case 1386—an order to demolish two houses erected on land where there was a right of common.

<sup>78</sup> *Ibid.*, case 1652.

<sup>79</sup> *Ibid.*, case 361.

<sup>80</sup> *Ibid.*, case 594.

<sup>81</sup> *Ibid.*, case 390.

<sup>82</sup> *Ibid.*, case 838.

<sup>83</sup> *Ibid.*, case 1165.

<sup>84</sup> *Ibid.*, case 1081.

<sup>85</sup> *Ibid.*, cases 1075, 1165.

<sup>86</sup> *Ibid.*, case 540, "Dictum est ei quod de cetero sub pena amissionis predictae terrae non faciat vastam vel destruccionem;" see generally Hazeltine, *op. cit.*, 269.

(b) The prevention of various kinds of wrongs to property.

It was only natural that the courts should make similar orders if a defendant was proved to have been guilty of specifically wrongful acts, such as nuisance or waste. Thus in one case a market,<sup>87</sup> and in another case a ditch,<sup>88</sup> was ordered to be suppressed because it was a nuisance. A guardian was ordered to replace two houses which had been removed, and to find pledges that he would both replace these houses and that he would commit no further waste.<sup>89</sup> But in the case of waste the court possessed another weapon in the writ of prohibition,<sup>90</sup> which at this period, was so developed that it did work analogous to that done both by the perpetual and the interlocutory injunction of our modern law. Thus the dowress,<sup>91</sup> the guardian,<sup>92</sup> and the lessee for life<sup>93</sup> or years,<sup>94</sup> could be prohibited from committing waste; and if, as in the case of the dowress, the commission of waste did not entail the forfeiture of the property, the heir could be given the power to appoint a person to see that no further waste was committed.<sup>95</sup> Further the writ of estrepment could be brought to prevent the commission of waste after judgment in a real action;<sup>96</sup> and, as extended by the statute of Gloucester, to prevent its commission pending the proceedings in such an action.<sup>97</sup> No doubt these writs of prohibition were as

<sup>87</sup> *Bracton's Note Book*, case 1162, "Consideratum est quod mercatum de Melefordia prosternatur et Abbas in misericordia."

<sup>88</sup> *Ibid.*, case 1253.

<sup>89</sup> *Bracton's Note Book*, case 1075, "Et ideo pro parvitate vasti et modo vastandi consideratum est quod Godefridus faciat alias duas domos ad valenciam predictarum domorum et sit in misericordia. Et invenit tales plegios quod amplias non faciat vastum nec arbores asportabit et quod faciat domos sicut predictum est."

<sup>90</sup> Hazeltine, *op. cit.*, 270-284.

<sup>91</sup> *Bracton's Note Book*, cases 461, 527, 540; Bracton, ff. 315, 316.

<sup>92</sup> *Bracton's Note Book*, cases 388, 443, 1075, 1165.

<sup>93</sup> *Ibid.*, case 607.

<sup>94</sup> *Ibid.*, case 540.

<sup>95</sup> *Bracton's Note Book*, case 56, "Consideratum est quod Albertus habeat forestarium suum et ipsi Hamon et Matillis nichil capiant nisi per visum forestarii ipsius Alberti scilicet, haibote et usbote, et sint in misericordia quia contra prohibicionem etc vastum inde fecerunt"; cf. Hazeltine, *op. cit.*, 272.

<sup>96</sup> Hazeltine, *op. cit.*, 275.

<sup>97</sup> 6 Edward I, c. 13.

often as not addressed to the sheriff, because he was the executive officer of the court.<sup>98</sup> But they could also be addressed to the parties, and, in such cases, it is clear that they present an analogy to the equitable injunction.<sup>99</sup>

In the Year Books of Edward I and II's reigns there are instances of specific relief given in cases which fell within the sphere of the real actions. Thus it is said in Y. B. 30, 31 Edward I,<sup>100</sup> "if a man ought to have house-bote and hay-bote in another's wood, and he to whom the wood belongs wishes to destroy the wood, the other can bring a Prohibition, and after that an attachment." Similarly in Y. B. 2, 3 Edward II the owner of a market got what was, in substance, an injunction to prevent persons from selling their goods otherwise than in the market on the days on which the market was held.<sup>101</sup> Moreover in the course of the fourteenth and fifteenth centuries developments had taken place in some of the real actions which enabled them to be used to remedy not only a completed wrong, but also to prevent an anticipated wrong.<sup>102</sup>

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<sup>98</sup> Hazeltine, *op. cit.*, 283.

<sup>99</sup> *Bracton's Note Book* affords many instances of both varieties; cp. F. N. B. 60 V, "When a man hath a real action depending, as a *Formedon*, or a *Dum fuit infra aetatem* or a writ of right, or such action wherein the demandant shall not recover damages; then he may sue this writ of Estrepment against the tenant, inhibiting him that he do not make waste or strip"; *ibid.*, 61 A, "And in every real action the demandant may have a writ unto the sheriff, commanding him that he see that the statute which ordaineth the estrepment be observed; and that he do not suffer the tenant to do such strip: and by the like reason he may have the writ against the tenant."

<sup>100</sup> Y. B. 30, 31, Ed. I (R. S.), 324.

<sup>101</sup> Y. B. 2, 3, Ed. II (S. S.), 74—"Et ideo consideratum est quod predictus Prior recuperet versus eos dampna sua predicta, et quod predicti Willelmus et alii decetero mercimonia sua venalia per dies Veneris, quibus idem Prior habet mercatum suum predictum, alibi in predicta villa de Coventre quam in predicto mercato suo non vendant seu vendicioni exponant."

<sup>102</sup> Coke says, *Co. Litt.*, 100a, "And note that there be six writs in law that may be maintained *quia timet*, before any molestation, distress or impleading. (1) A man may have his writ of *mesne* (whereof Littleton here speaks) before he be distrained, (2) A *warrantia cartae*, before he be impleaded. (3) A *Monstraverunt* before any distress or vexation. (4) An *Audita Querela*, before any execution sued. (5) A *curia claudenda*, before any default of inclosure. (6) A *ne injuste vexes*, before any distress or molestation. And these be called *Brevia anticipantia*, writs of prevention"; Coke cites no authority for this, and it is

It is clear that in all these cases the specific relief given centered round the real actions. It was therefore bound up with and conditioned by the technical rules of the most technical part of the common law. Even in the Middle Ages cases had arisen which showed that, even as between persons entitled to land, the principles upon which the common law acted were too narrow.<sup>108</sup> Now, if we turn to the principles upon which the chancellor gave this specific relief, we shall see that they were quite different from and much wider than those of the common law. He granted it whenever in the circumstances he thought that it was fair that it should be granted. It is not surprising that equitable relief given on this principle should, from an early date, have supplemented the relief given by the common law courts; and that, finally, when the specific relief given by the common law declined in importance with the decline of the real actions, it should have superseded it.

The width of the principle upon which the chancellor gave specific relief led litigants in early days to apply to him in

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probable from the form of these writs that their use *quia timet* was a comparatively late development; thus Litt., § 141, clearly supposes that the tenant must have been distrained before *Mesne* lay; and this was the original form of the writ, F. N. B. 135 M. The earliest case cited by Fitzherbert in which the writ was brought before distraint is of Henry IV's reign, Bro. Ab. *Mesne*, citing a MS. Y. B. of 7 Hy. IV; in Y. B. 22 Hy. VI, Mich. pl. 39 (p. 23), it appears that the question how far *warrantia cartae* lay *quia timet* was by no means clear; Fitzherbert, N. B., says nothing of the use of the writ of *Monstraverunt quia timet*; the form of the writ *Audita Querela* supposes execution, F. N. B. 103 H., and he says nothing of its use *quia timet*; the first case cited by F. N. B. for the proposition that *Curia Claudenda* lies *quia timet* is 27 Hy. VI.; the form of the writ *ne injuste vexes* would seem to permit of its use *quia timet*, but the count given by F. N. B. 10 H. supposes the completed wrong. I think therefore that the use of these writs *quia timet* was due to developments of the fourteenth and fifteenth centuries; similarly the writ of *Estrepment* was extended to all actions in which damages were recoverable, cf. Y. B. 14 Hy. VII, Mich. pl. 17, with F. N. B. 60 Y.; an attempt to extend this writ still further was suppressed by Lord Egerton in 1594, Hazeltine, *Legal Essays*, 277.

<sup>108</sup> "Per Egerton custodem magni sigilli, que il ad view un president en temps de R. 2 que l'ou la est tenant pur vie le remainder pur vie, le remainder ouster in fee, per que le wast en le primer tenant pur vie est dispunishable per le common ley: uncore ad estre decree en Chancery per l'advice des Judges sur complaint de cestuy en remainder en fee, que le primer tenant ne fairsa wast, et injunction la grant," (1599) Moore, K. B., 554, pl. 748.

cases which, being outside the sphere of the real actions, no specific relief could be given at common law. We get bills for the delivery up of specific chattels against not only the persons who had taken or otherwise possessed themselves of them,<sup>104</sup> or to whom they had been bailed,<sup>105</sup> but also against third persons into whose hands they had come.<sup>106</sup> We get bills for the performance of specific acts;<sup>107</sup> for the specific performance of contracts,<sup>108</sup> injunctions against wrongs.<sup>109</sup> No doubt, when litigants began to apply to the chancellor for specific relief in cases in which similar relief might have been got in a real action, equity followed the law. It may even have borrowed some of its ideas and rules from it.<sup>110</sup> It was obviously fair that similar relief should be given. But the principle upon which it acted was different and wider. It is these wider principles, and not the principles applied by the common law courts in connection with the real actions which govern our modern law. I think therefore that, though there are many analogies between the two sets of principles, there is no real continuity.<sup>111</sup>

### Uses

On this point I can fortunately be brief, as the point which I wish to make has already been made by Ames.<sup>112</sup> Though there

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<sup>104</sup> *Select Cases in Chancery* (S. S.), 82, 100-101, 113-4; *Proceedings in Chancery* (Rec. Com.), II., vii; Barbour, *op. cit.*, 174.

<sup>105</sup> Barbour, *op. cit.*, 112.

<sup>106</sup> *Ibid.*, 114 n. 4; cp. Earl of Shrewsbury v. Coland, *Proceedings in Chancery* (Rec. Com.), I., xl.

<sup>107</sup> Barbour, *op. cit.*, 87-8—cancellation of documents; *Select Cases in Chancery* (S. S.), 130-1, a suit for partition.

<sup>108</sup> *Select Cases in Chancery* (S. S.), 43-4, 122-3, 137-143.

<sup>109</sup> *Ibid.*, 20-21; *Proceedings in Chancery* (Rec. Com.), I., lxii-iii, cp. Spence, *op. cit.*, I., 671-2.

<sup>110</sup> Thus Ashburner, *Principles of Equity*, 494 n. d, suggests that the writ of estrepment may have formed a model for the injunction; cp. Hazeltine, *Essays in Legal History*, 277; but, as Ashburner says, the writ "became obsolete at an early time."

<sup>111</sup> The development of the equitable jurisdiction over account, and the manner in which it superseded the older common law jurisdiction, is analogous; the common law had a writ of account, but the scope of it was so narrow and the procedure upon it was so cumbrous that it dropped out; equity filled the gap, so that the modern law is founded wholly on the principles worked out by equity, see Holdsworth, *Hist. Eng. Law*, I., 246. ed. 2, n. 1; III., 322-3; Barbour, *op. cit.*, 13-17.

<sup>112</sup> The Origin of Uses and Trusts, 21 HARV. LAW REV. 261-9.

are many indications that the English common law in the time of Bracton might have decided to protect the man on whose account, or to whose use another holds,<sup>113</sup> it is certain that it refused to do so.<sup>114</sup> The cestui que use was therefore driven into the Chancery; and his position was worked out by a series of decisions, firstly, upon the question what were the duties which a conscientious man in the position of a feoffee to uses would consider that he owed to the cestui que use; and secondly, upon the question what persons who had got possession of the land could be considered to be bound in conscience to fulfill these duties. As Ames says,<sup>115</sup> "the feoffee to uses, so long as his obligation was merely honorary, may properly enough be identified with the German *Salman* or *Treuhand*. But the transformation of the honorary obligation of the feoffee into a legal obligation was a purely English development" and, we may add, a development due entirely to the equitable jurisdiction of the chancellor. Though we must look to the *Salman* or *Treuhand* for the origin of the idea that property could be entrusted by its owner to a person who was bound to deal with it according to the wishes of the owner, the shape which that idea took in English law is wholly the result of the manner in which the interest both of the man who thus entrusted the property, and of the third persons for whose benefit it was entrusted, was protected by the chancellor. If the use had developed in accordance with those equitable ideas which we can discover in the common law of the thirteenth century, it would never have developed into that species of equitable ownership which is one of the most unique features of English law. Here again, therefore, continuity between the ideas of the equity administered by the common law courts and the equity administered by the chancellor is conspicuous by its absence.

<sup>113</sup> So common was the practice of holding to another's use that in the first half of the thirteenth century, a jury, after a finding that a certain Robert held a hundred, could be asked, "ad opus cuius, utrum ad opus proprium vel ad opus ipsius Ricardi," cited Pollock and Maitland, *History of English Law* (1st Ed.), II., 233, from Assize Roll, no. 1182 m. 8.

<sup>114</sup> See the opinion of the judges in 1379 as to the position of the feoffees under Edward III's will, *Rot. Parl.*, iii, 60, 2 Rich. II, no. 26; it is clear that all that the judges would recognise was a condition which was imposed at the time when the gift was made, and not afterwards, *ibid.*; such a condition could not be taken advantage of by anyone but the feoffor or his heirs, see Holdsworth, *Hist. Eng. Law*, II., 504 n. 6.

<sup>115</sup> 21 HARV. LAW REV. 265.

## CONCLUSION

The root idea of equity is the idea that the law should be administered fairly, and that hard cases should so far as possible be avoided. This idea is common to many system of law at all stages of their development.<sup>116</sup> It came very naturally to the mediaeval mind, which regarded the establishment of justice, through, or even in spite of, the law, as the ideal to be aimed at by all rulers. It is obvious in the common law of the thirteenth century. But the common law hardened too early into a rigid technical system. During the fourteenth century the outlook of the judges became narrowed. The increasing number and technicality of the ordinary forms and processes of the common law tended to concentrate their attention upon the working and management of this complicated machinery.<sup>117</sup> They ceased to care so much for those larger principles which, in the thirteenth century, had made for rapid development. Moreover they ceased to be so closely identified with the person of the king that they could assume his prerogative to administer equity. That prerogative naturally came to be administered by those courts and officials who acted as the more immediate agents of the king.

Thus the equitable principles which we can discern in the common law right down to the beginning of the fourteenth century gradually evaporated. It was this fact which made the intervention of the chancellor necessary. No doubt both the equity of the common law courts and the equity of the chancellor are both ultimately traceable to the theory that the king must do justice—even though he interfered with the strict rules of law. No doubt in the twelfth and thirteenth, as in the fourteenth and fifteenth centuries, the king administered this justice through the Council and the courts immediately connected therewith. In the twelfth and thirteenth centuries the King's Bench and the Eyre were closely connected with king and Council: in the fourteenth and fifteenth centuries the Eyre had ceased, and the King's Bench had lost its close connection with king and Council. This justice, therefore, came to be administered by the chancellor, who from that day to this has always been

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<sup>116</sup> Pollock, *The Transformation of Equity, Essays in Legal History*, 287-290.

<sup>117</sup> Holdsworth, *Hist. Eng. Law*, II., 502, 503.

closely connected with the king, and in the Chancery. Thus it was through the Chancery, and not through the common law courts, that the stream of equity now flowed. No doubt some of the equitable ideas which had appeared in the common law courts in the thirteenth century, reappear in the Chancery—they had a common ancestor in king and Council. But, because these equitable ideas flowed through the channel of the Chancery, they were worked up into a technical system under influences and by machinery, which were very different from the influences which affected them and the machinery by which they were administered, when they flowed through the channel of the common law courts. The rules evolved in the Chancery were shaped partly by antagonism to the rigidity of common law rules; partly by ideas as to the function of conscience in determining the morally right, and therefore the equitable rule, which were borrowed from the canon lawyers; partly by a procedure, quite different from the common law procedure, which enabled the chancellor to ascertain what was the equitable course to take in each particular case. For these reasons the equity developed by the chancellor took a shape very different from the shape which it would have taken if it had been developed in the common law courts. Whether we look at the court which administered it, at the procedure which that court employed, at the theory upon which equity was based, or at the contents of the equitable rules, we see a striking contrast between these two phases in the administration of equity. It is so striking that we must conclude that our modern system of equity created by the chancellor is, not a continuation of the equity administered by the common law courts, but a new, a distinct, and an independent development.

W. S. HOLDSWORTH.

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